

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 16-1-1996.

CRIMINAL APPEAL NO. 1007 OF 1988

For Approval and Signature:

THE HON'BLE MR. JUSTICE A.N. DIVECHA

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?
2. To be referred to the Reporter or not ?
3. Whether Their Lordships wish to see the fair copy of Judgment ?
4. Whether this case involves substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
5. Whether it is to be circulated to the Civil Judge?

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Shri Adil Mehta, Advocate for the appellant.

Shri S.T. Mehta, Addl. Public Prosecutor for the respondent.

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Coram: A.N. Divecha, J. & H.R. Shelat, J.
(16-1-1996)

ORAL JUDGMENT: (Per: H.R. Shelat, J.)

This appeal has been directed against the judgment and order dated 29th October 1988, passed by the then learned Additional Sessions Judge, Panchmahals at Godhra, in Sessions Case No. 98 of 1988 whereby the appellant-original accused No.1 came to be convicted of the offence punishable under Section 302 and sentenced to life imprisonment.

2. The facts leading the appellant to prefer the present appeal may in brief be stated. On 13th April 1988 the cattle of Andarsinh Kalubhai-the complainant, had trespassed into the field of Chandu Bijal (original accused No.5) and had caused damage to the crop. The appellant, Bhala Chandu, Naval Bijal, Sardar Bijal and Chandu Bijal therefore in that connection altercated with Prabhat Kalu and quarrelled as well. They then planned to take revenge. On 14th April 1988 armed with iron bar and stick, all the 5 accused forming an unlawful assembly, the common object of which was to cause injury to Arjun Kalu and allied wrong-doers went near the house of Andarsinh & Arjun at 21.00 hours. They called names to Arjun Kalu. Arjun Kalu therefore went out of his house and urged all the five not to abuse. They then apprised him that his cattle had on the previous day entered into their field and caused damage to the crop. Taking this lightly Andarsinh who had also gone out of his house hearing clamour, told that cattle might have, and then exclaimed what harm was then caused. The turbulent appellant and abovenamed four others were annoyed and enraged. They dragged Andarsinh and Arjun into the vada on the back of their house and showered iron-bar and stick blows on Arjun. He was seriously injured. Andarsinh tried to rescue. He also sustained injuries. Akhamben, the wife of Andarsinh Kalu, rushed there to save both in peril. Prabhat also followed. Bhala Chandu (Orig. accused No.2) caused them serious injuries by stick-blows. Jashiben the wife of Arjun had gone there to rescue. All the five then ran away. Andarsinh and others then could see that Arjun Kalu was no more. Andarsinh Kalu then went to the police patel and informed him about the incident. The police patel went to the scene of offence. He advised Andarsinh Kalu to go to the police station and lodge the complaint. On the next day in the morning at 5.00 a.m. Andarsinh Kalu went to the police station at Godhra and lodged the complaint. The police officer then investigated into the case. At the conclusion of the investigation a chargesheet of the offences under Section 447, 302, 323, 147, 148, & 149 I.P. Code against the appellant and abovenamed 4 others came to be filed before the Court of the Chief Judicial Magistrate at Godhra. The learned Chief Judicial Magistrate at Godhra was not in law competent to hear and decide the case of murder. He therefore committed the case to the Court of Sessions at Godhra. It came to be numbered as Sessions Case No. 98 of 1988. The then learned Sessions Judge at Godhra assigned the matter to the then learned Additional Sessions Judge at Godhra for hearing and disposal in accordance with law. Thereafter the charge, Exh.2 was framed against the appellant and 4 others. They pleaded not guilty. The prosecution then led necessary evidence. At the conclusion of the trial appreciating the evidence on record and considering the rival submissions, the learned Judge below held the appellant guilty of the offence under Section 302 and sentenced him to life imprisonment. Bhala Chandu and Naval

Bijal, (original accused Nos.2 & 3) were convicted of the offence under Section 323 and sentenced to 6 months rigorous imprisonment, and fine of Rs.500/-; in default, rigorous imprisonment for one month more. Rest of the two accused Sardar Bijal and Chandu Bijal came to be acquitted. It is against that judgment and order, the appellant-original accused No.1 has preferred this appeal.

3. Mr. Adil Mehta, the learned Advocate representing the appellant submitted that the learned Judge fell into error while appreciating the evidence on record and reaching to the conclusions against the appellant. The reasonings of the lower Court were not appealing. The evidence on record was fishy. The case was concocted and the appellant and others were falsely implicated. Mr. S.T. Mehta, the learned A.P.P. submitted that no error either of law or fact was committed by the learned Judge. The conviction and sentence inflicted were quite in consonance with law and there was no reason to upset the same.

4. The prosecution mainly relies upon the evidence of Andarsinh Kalu (Exh.26), Prabhat Kalu (Exh.31) and Jashiben, the widow of the deceased (Exh.32) as other witnesses came to the scene after the incident was over or few days thereafter. Before we deal with the evidence of these 3 witnesses, it may be mentioned that on the basis of the evidence of Dr. L.S. Rathod (Exh.22), it is evident that Andarsinh, Akhamben and Prabhat were injured. Through the evidence of Dr. Shaliniben B. Pokhar (Exh.49) the prosecution has succeeded in establishing that Arjun Kalu died because of the injuries he sustained and his death was unnatural, i.e., homicidal. But who caused the injuries and how the incident occurred has remained under a cloud. We will now examine the evidence of above 3 witnesses.

5. What transpires from the evidence of Andarsinh is that the son of Fata Khatu was to marry. Hence the marriage party (Jan) had gone to Vaktapura, about 10 kms. away from Kotda. He had joined the marriage party. The police patel and accused Nos. 2-3-5 had also joined the marriage party. The marriage party left on the day of incident and returned on the next day (15-4-88) afternoon. Such versions of Andarsinh discredit the truth of the prosecution case about occurrence of incident; his as well as presence of the witnesses, Police Patel and accused Nos. 2-3 & 5. Andarsinh has admitted that he did not name accused No.5 in F.I.R. It may however be stated that Andarsinh is injured. What can therefore be deduced is that genesis of the incident inclusive of time, date and place is deliberately suppressed and giving a new shape to the story, distorted versions and case are putforth. The evidence being fishy, we do not find it just and proper to place any reliance unless independent evidence supporting him is available, which is certainly lacking.

6. No doubt, Prabhat Kalu has supported the case of the prosecution; but his evidence is also highly suspicious. It seems to plug the lacuna or to remove the doubts created by Andarsinh Kalu, Prabhat Kalu made necessary improvements, guardedly and delude the concerned authority thereby. In the cross-examination he has admitted that on the day of incident the marriage party had gone to Vaktapura and the Police Patel had joined the same. His brother Andarsinh, the Police Patel and accused Nos.2-3-5 had not gone. With a view not to damage the case, he also made it clear that the marriage party had come back on the same day at 5.00 p.m. He thus states contrary to what Andarsinh has stated. It may be stated that Fata Khatu resides in the street wherein the injured reside and the deceased resided. Virtually from that street all had attended the marriage. Hearing the din no one had gone to the place of offence is the say of Prabhat, and that leads us to believe that the marriage party had not returned on the same day. Jashiben, the widow of Arjun Kalu has also twisted the case. According to her Andarsinh and almost all from the street had gone to attend the marriage, but Andarsinh had returned earlier at 8.00 p.m., which is not the say of Andarsinh and Prabhat. She states further that when it was dark after Sunset the marriage party had returned. Hearing their shouts about 50 persons from that street had collected, and had seen the incident. Both thus make conflicting statements so as to revamp the case already riven and defaced by Andarsinh. Their say therefore does not inspire confidence. Their conflicting version with regard to the departure and arrival of the marriage party, and persons who joined the marriage party, lead us to hold that the evidence of all the three witnesses is neither trustworthy nor reliable nor unimpeachable. It is fishy and cannot be acted upon, independent corroboration is necessary, which is not available on record.

7. The prosecution has not examined Akhamben and no reason is assigned. The Police Patel and the Sarpanch are also not examined. Jashiben has no doubt stated that about 50 persons had rushed to the place of incident hearing their shouts and they had seen the incident, but no one out of those 50 is examined. The omission is not even explained. We are therefore entitled to infer everything against the prosecution. It would not be unjust to hold that these 3 witnesses making conflicting versions about the marriage party clamp down on the manner in which incident happened. According to Jashiben, the Police Patel and the Sarpanch were informed. Whatever Andarsinh stated to them was reduced to writing and below it her thumb impression was taken. Taking that writing, Andarsinh had gone to the police station to lodge a complaint. He then lodged the complaint, but it is not made clear where the writing he took to the police station is, who kept the same and why it is not produced on record. Why another complaint was lodged is also conveniently kept silent.

It can be said on the basis of such facts that the marriage party did not return on the day of incident, and origin of the incident is shrewdly suppressed. We therefore agree with the appellant's learned advocate that the evidence of these 3 witnesses being incredible topples down the prosecution's case, rather than supporting the same.

8. Dr. Shaliniben B. Pokher (Exh.29) performed the post mortem at 11.00 a.m. on 15th April 1988. As per the opinion given by her, the injury she saw on the person of the deceased could have been caused prior to 24 hours of her examination. If that is the case, the incident must have happened prior to 11.00 a.m. on 14th April 1988. But the prosecution has come forward with the specific case that the incident happened on 14th April 1988 at 21.00 hours. The evidence of the doctor also gives fatal blow to the prosecution.

9. We cannot miss to mention the fact, emerging from the evidence of Andarsinh Kalu, going to support the defence raised. As per the custom, at the time of celebration of marriage according to Andarsinh, the invitees were served with liquor. Every one attending the marriage had taken liquor and under the influence thereof, they scuffled inter se. With the result Arjun Kalu and others came to be injured. When thus the defence is found probable and the evidence of the prosecution is not free from inherent improbabilities, the conviction and sentence inflicted on appellant cannot be maintained.

10. In view of the matter, the appeal is required to be allowed and conviction and sentence inflicted on the appellant are required to be quashed. In the result, the present appeal is allowed. The judgment and order, convicting the appellant of the offence under Section 302, I.P. Code and sentencing him to life imprisonment, are hereby quashed and set aside, and the appellant is acquitted of the same. We are informed that the appellant at present is in jail. He be set at liberty forthwith if no longer required in any other matter.

11. The muddamal be dealt with in accordance with the order of the lower Court.

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